DOCUMENT RESUME

ED 466 085 EC 309 055

AUTHOR	Cernosia, Art
TITLE	Parentally-Placed Students with Disabilities.
INSTITUTION	Council for Exceptional Children, Arlington, VA.
SPONS AGENCY	Special Education Programs (ED/OSERS), Washington, DC.
ISBN	ISBN-0-86586-956-1
PUB DATE	2002-04-00
NOTE	39p.; Developed by the Urban Special Education Leadership Collaborative (USELC) and IDEA Local Implementation by Local Administrators (ILIAD) Partnership.
CONTRACT	H326A80006
AVAILABLE FROM	Council for Exceptional Children, 1110 North Glebe Rd., Arlington, VA 22201-5704. Tel: 888-232-7733 (Toll Free); TTY: 703-264-9446; Fax: 703-264-9494; e-mail: service@cec.sped.org. For full text: http://www.ideapractices.org/.
PUB TYPE	Reports - Descriptive (141)
EDRS PRICE	MF01/PC02 Plus Postage.
DESCRIPTORS	*Compliance (Legal); *Disabilities; Educational Legislation; Elementary Secondary Education; Federal Legislation; *Home Schooling; *Parent Role; *Private Schools; School Districts; *Student Placement
IDENTIFIERS	*Individuals with Disabilities Education Act

ABSTRACT

This monograph provides an overview of the Individuals with Disabilities Education Act (IDEA), its regulations, and relevant case law regarding parentally-placed students with disabilities in private schools. Following a brief review of early judicial decisions and the IDEA regulations concerning parental placements, a summary of current IDEA requirements on this topic is provided. This covers the areas of Child Find, service determination, services plans, location of services, reevaluations, due process rights, home-schooled students, preschoolers, and services on-site of a parochial school. Public school officials are urged to ensure that the local education agency has policies and procedures that comply with IDEA in all these areas for students with disabilities who are home-schooled or placed in private schools by their parents. An appendix provides a memorandum from the Office of Special Education Programs with an attachment of 45 questions and answers on obligations of public agencies in serving children with disabilities placed by their parents at private schools. Also attached is an example of proportionate share calculation for parentally-placed private school children with disabilities. (DB)

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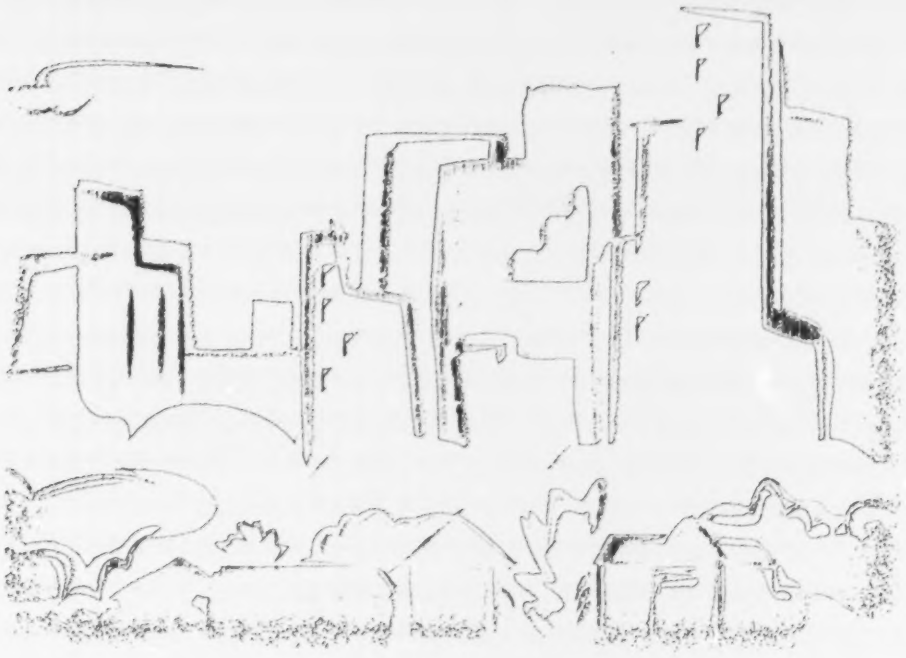

PARENTALLY-PLACED STUDENTS WITH *Disabilities*

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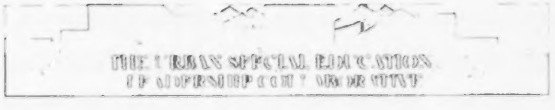

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Library of Congress Cataloging-in-Publication Data
Title/Author
p. cm.
Includes bibliographical references and index
ISBN 0-86586-956-1
HV1596.2.E77 1999
362.4'18'083-dc21 99-41221
CIP

The ILIAD[1] Project at the Council for Exceptional Children, is a leadership initiative in partnership with the ASPIIRE, FAPE, and PMP IDEA Partnership Projects[2]. Funding comes from the U.S. Department of Education, Office of Special Education Programs (Cooperative Agreement No. H326A80006). This document was reviewed by the U.S. Office of Special Education Programs (OSEP), the OSEP Project Officer and the ILIAD Project Director for consistency with the Individuals with Disabilities Education Act Amendments of 1997. The contents of this document do not necessarily reflect the views or policies of the Department of Education, nor does mention of other organizations imply endorsement by those organizations or the U.S. Government.

[1]IDEA Local Implementation by Local Administrators Partnership

[2]Associations of Service Providers Implementing IDEA Reforms in Education PartnershipFamilies and Advocates Partnership for Education, The Policymaker Partnership

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1110 No. Glebe Rd., Suite 300
Arlington, VA 22201-5704

Voice: 1-888-232-7733
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Acknowledgments

The IDEA Local Implementation by Local Administrators Partnership (ILIAD) Project at the Council for Exceptional Children is a leadership initiative in collaboration with the other IDEA Partnership Projects that include the Associations of Service Providers Implementing IDEA Reforms in Education Partnership (ASPIIRE), the Families and Advocates Partnership for Education (FAPE), and the Policymaker Partnership (PMP). Funding comes from the U.S. Department of Education, Office of Special Education Programs (OSEP) (Cooperative Agreement No. H326A80005). This document was reviewed by OSEP for consistency with the Individuals with Disabilities Education Act (IDEA) Amendments of 1997. The contents of this document do not necessarily reflect the views or policies of the U.S. Department of Education, nor does mention of other organizations imply endorsement by these organizations or the U.S. Government.

Parentally-Placed Students with Disabilities was developed by The Urban Special Education Leadership Collaborative (USELC), a proud member of the ILIAD Partnership Project. The following individuals provided leadership on this project:

David Riley, Director, USELC
Jay McIntire, former Director, ILIAD
Stephanie Wood-Garnett, Director, ILIAD
Selete Avoké, Project Officer (ILIAD and ASPIIRE), OSEP

The author of this paper is Art Cernosia, an Attorney and Education Consultant from Vermont. He has worked with state and local education agencies and parents/advocacy organizations throughout the country in the area of special education law.

This document is available in alternative format, upon request, Braille, large print, and diskette.

Introduction

The law and practices regarding the provision of special education and related services to students with disabilities placed by their parents in private schools have developed over the past several years as a result of court cases and administrative policy interpretive guidance. Until the 1997 Amendments to the Individuals with Disabilities Education Act (IDEA), neither the federal statute, nor the applicable federal regulations (34 C.F.R. Part 300) addressed this issue in detail.

This article is intended to provide an overview of the IDEA, its regulations, and relevant case law regarding parentally-placed students with disabilities in private schools. The article will address what the rights and responsibilities under the IDEA are in identifying and providing special education services to parentally-placed private school students with disabilities. This topic should be distinguished from other situations where a student with a disability is receiving services from a private school. If the public agency places a student with disability in a private school as a means of fulfilling the school's obligations to provide a free appropriate public education (FAPE), the student maintains an individual legal entitlement to services and the parents have full access to all the procedural safeguards provided by the IDEA. In addition, when the parents have made a "unilateral placement" of the student in a private school when the provision of a free appropriate public education is an issue, the parents may seek full reimbursement for all costs associated with that placement from a hearing officer or a court.

The reader of this article should also be aware that many states have state laws that provide for greater rights and legal entitlements than the IDEA. For example, some states such as Texas and Idaho have dual enrollment state statutes allowing students, including students with disabilities, who attend private schools to also enroll in the public schools and receive desired services, which may include special education. Therefore, state law and local school district policy should also be reviewed.

Early Judicial Decisions

One of the first court cases to address the issue of what, if any, legal obligation a school district had under the IDEA to provide special education services to a parentally-placed private school student with a disability was handed down by the United States Court of Appeals for the Fourth Circuit. The case, Goodall v. Stafford County School Board, 17 Individuals with Disabilities Law Report (IDELR) 745 (1991), involved a student with a profound hearing impairment who was placed by his parents in a parochial school. The school district offered to provide special education and related services pursuant to an IEP in the local public school. The parents initiated legal action when the school district refused to provide a cued speech interpreter at the private school. The Court upheld the school district's position stating that it met its obligations under the Education for All Handicapped Children's Act (now the IDEA) by offering the student special education and related services at the public school site.

The United States Supreme Court, in 1993, addressed the issue of whether the provision of a sign language interpreter by a public school district on site in a parochial school would violate the Establishment Clause of the First Amendment to the Constitution which provides for the separation of church and state. In Zobrest v. Catalina School District, 19 IDELR 921 (1993), the Supreme Court held that a school district is not prohibited by the United States Constitution from providing a sign language interpreter to a student with a disability who is attending a parochial school. The Supreme Court's decision never addressed, however, whether the school district was obligated, under the IDEA, to provide such services. The decision clarified that the Constitution did not stand in the way of a district's choice to provide such service. In so doing, the Court noted that there is a distinction between the tasks of a sign language interpreter who acts as a transmitter of what is said and that of a teacher or guidance counselor.

Early United States Department of Education Guidance

Initially, the guidance on this topic was in the form of interpretive policy letters issued by the Office of Special Education Programs (OSEP) of the United States Department of Education applying the Educational Department General Administrative Regulations (EDGAR) to the provision of special education services under the IDEA. See for example OSEP Letter, 16 IDELR 1398 (1990). The United States Department of Education took a more formal position in 1994 when it submitted an amicus brief in a case from the Eleventh Circuit, Tribble v. Montgomery County Board of Education, July 1992. The brief was distributed to the public as an OSEP Memorandum (OSEP Memorandum 94-17, April 13,1994) which reiterated the Department's long standing position on this issue.

At issue in Tribble was whether the school district was required by the IDEA to provide a parentally-placed preschool student with a disability with the equivalent special education and related services he would receive if he attended a public school program. The Memorandum states:

... the United States articulates the Department's longstanding interpretation of the requirements of Part B that children with disabilities placed in private schools by their parents do not have an individual entitlement to services under Part B, but that private school children as a group must be afforded a genuine opportunity for equitable participation in special education programs conducted by local school districts.

Significant Judicial Decisions Preceding the 1997 Amendments to the IDEA

Prior to 1997, the courts were in disagreement as to what, if any, special education services were due students with disabilities when they were placed in private schools by their parents. The two leading judicial decisions on the issue were from the Seventh and Second Circuits.

The United States Court of Appeals, Seventh Circuit, in K.R. v. Anderson Community School Corporation, 23 IDELR 1137 (1996), in overturning the lower court's decision, held that the IDEA does not entitle students with disabilities placed in private schools by their parents to a comparable range of special education services they would receive if enrolled in a public school. In this case, the parents were requesting the services of an instructional assistant on the premises of the parochial school where they enrolled their child. According to the Court, the IDEA gives the school district discretion to decide what services will be offered in order to provide private school students with a "genuine opportunity for equitable participation" in programs under Part B of the IDEA.

On the other hand, the United States Court of Appeals, Second Circuit, in Russman v. Board of Education of the Enlarged City School District of the City of Watervliet, 24 IDELR 274 (1996), ordered a school district to provide a student with disabilities parentally-placed in a private school with the services of a consulting teacher and teaching aide on site in the parochial school. In doing so, the Court determined that the IDEA rights of private school students with disabilities were "more consistent with mandatory entitlement than with discretionary authority" suggested by OSEP and other judicial decisions.

Both cases were appealed to the United States Supreme Court while the Congress was in the process of reauthorizing the IDEA. The reauthorization process was completed by the Congress and the President signed IDEA '97on June 4,1997. The Supreme Court, in June 1997, vacated the decisions and remanded the cases back to the Courts of Appeals "for further consideration in light of the Individuals with Disabilities Education Act Amendments of 1997."

The 1997 Amendments to the IDEA (IDEA '97)

IDEA Amendments Act of 1997 detailed the fiscal scope and services for parentally-placed private school students with disabilities. The statutory provision states:

To the extent consistent with the number and location of children with disabilities in the state who are enrolled by their parent in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children's special education and related services in accordance with the following requirements ...

- Amounts expended for the provision of those services by a local educational agency (LEA) shall be equal to a proportionate amount of federal funds made available under this part.
- Such services may be provided to children with disabilities on the premises of private, including parochial schools, to the extent consistent with law.

- The requirements ... relating to child find shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools. 20 U.S.C. Section 1412 (a)(10).

Reconsideration of the K.R. and Russman Decisions

The Seventh and Second Circuits reconsidered their previous decisions in light of the IDEA '97 and reached consensus on the obligation to provide special education services to parentally-placed private school children with disabilities.

The Seventh Circuit upheld its previous ruling finding that the IDEA '97 requires school districts to offer FAPE to all students with disabilities. However, if FAPE is offered at a public school and the parents voluntarily choose to enroll their child in a private school, the school district is not obligated to offer "comparable" services at the private school. The Court also rejected the parent's assertion that the district, by refusing to provide the services at the parochial school, infringed upon the student's exercise of religion. K.R. v. Anderson Community School Corporation, 26 IDELR 864 (1997).

The Second Circuit reversed its original opinion and concluded that the school district was not obligated under the IDEA to provide special education and related services to voluntarily enrolled private school students. According to the Court, the IDEA '97 only requires that a district provide private school student with disabilities special education services using a proportionate amount of federal Part B funds. Although school districts are permitted under the IDEA to furnish on site services, the language of the statute is permissive. Russman v. Mills, 28 IDELR 612 (1998). See also Cefalu v. East Baton Rouge Parish School Board, 26 IDELR 166 (United States Court of Appeals, Fifth Circuit (1997)).

The IDEA Regulations (34 C.F.R. Part 300)

Although the basic issues were addressed through the statute and judicial decisions, many implementation issues remained unresolved until the United States Department of Education promulgated the final IDEA regulations in March 1999.

Reference in the following summary is made to both specific IDEA regulatory sections (Part 300 of Title 34 of the Code of Federal Regulations) and to the Analysis and Comments to the IDEA Regulations contained in the Federal Register of March 12, 1999. The Analysis and Comments summarize the United States Department of Education's intent in promulgating the regulations.

It should also be emphasized that the IDEA sets a minimum legal standard of practice. The IDEA regulations make clear that nothing in the IDEA prevents a LEA from providing more services than are legally required. Again, it is important to also be aware of any applicable state law or local district policy that may require the LEA to provide more services than are required under the IDEA.

Recent OSEP Policy Guidance

The Office of Special Education Programs has issued a technical assistance document (OSEP Memorandum 00-14, May 4, 2000) in a question and answer format to assist families of students with disabilities, state and local education officials and private school representatives to better understand the IDEA requirements. Excerpts from this Memorandum are included in the following discussion.

Summary of Current IDEA Requirements

Child Find

The regulations underscore that local educational agencies maintain the responsibility to engage in child find activities in locating, identifying, and evaluating children, who are legal residents of the LEA as provided for under state law, who may have a disability and be in need of special education services regardless of whether they are enrolled in a public school. 34 C.F.R. §§300.125 (a)(1)(i) and 300.451. In doing so, the LEA must consult with appropriate representatives of private school students with disabilities on how to carry out child find activities for private school students.

The child find activities that the LEA engages in for private school children must be comparable to the activities that it uses to evaluate students in the public school. Therefore, parents are entitled to the procedural safeguards that apply including the right to participate in evaluation and eligibility meetings, be provided with a copy of the Evaluation Report and eligibility determination, be provided with prior written notice of proposed or refused actions, and be asked to provide informed written consent for the initial evaluation. In addition, parents have the right to request a due process hearing to challenge decisions pertaining to the identification and evaluation of their child.

The determination that a private school student has a disability and is in need of special education services, however, does not result in an entitlement to IEP services unless the student then enrolls in the public schools. Under the IDEA statute and regulations, a student with a disability who is placed by his/her parents in a private school has no individual legal entitlement to receive some or all of the special education and related services they would receive if enrolled in a public school. Parents must be informed by the LEA that, should they enroll their child in the public school, the school will provide a free appropriate public education. 34 C.F.R. §§300.300, 300.454.

Under recent OSEP policy guidelines, if a determination is made that a student in a private school is eligible for special education services, the general rule is that the LEA must convene an IEP Team to develop an IEP for the student. This provides the parents with specific information regarding what a free appropriate public education would be for their child so that they can decide whether to maintain the private school placement or to enroll their child in the public school to receive IEP services. The exception to this requirement would occur if the parents clearly indicate their intent to enroll or to maintain their child in the private school and are not interested in considering a public program or placement. In such a case an IEP would not need to be developed. (See Question 8, OSEP Memorandum 00-14).

Service Determination

The LEA is required to consult with appropriate representatives of private school students with disabilities, in a timely and meaningful way, regarding the number of private school students with disabilities, their needs and location in order to decide: which students will receive services, what services will be provided, how and where the services will be provided and how the services will be evaluated. 34 C.F.R. §300.454(b). The law leaves discretion for the LEA to determine who would be appropriate representatives of such students. Appropriate representatives may include parents, teachers, as well as building or central office administrators. (See Question 25, OSEP Memorandum 00-14).

The Analysis and Comments to the regulations clarify that the LEAs and States determine the appropriate period between consultations based on circumstances in each jurisdiction. An annual consultation is not automatically required.

Based on the information received, the LEA determines what services and which students will receive special education and related services using a proportionate amount of their IDEA Part B grant.

The proportion is based on the number of private school children with disabilities (ages 3 through 21) residing in the LEA compared to the total number of children with disabilities (ages 3 throught 21) residing in the LEA. The number of private school children with disabilities used to calculate the proportionate share is based on *the total number of private school children* identified through child find as being eligible for special education services, not just the number of such students who are receiving special education or related services in accordance with a services plan. (See Question 15, OSEP Memorandum 00-14).

For example, if the LEA has 1,000 children with disabilities and of those children, 50 have been placed by their parents in private schools, the LEA would be required to spend on providing special education and related services, an amount that at least equals 5% or (50/1,000) of its Part B sub-grant. The LEA needs to determine such proportionate share of both:

- the LEA's General Part B subgrant for students with disabilities ages 3 through 21, and
- the LEA's Preschool (Section 619) subgrant for students with disabilities ages 3 through 5.

In determining whether the LEA has met this minimum expenditure requirement, the LEA can use local, state and/or federal funds to provide the services. 34 C.F.R. §300.453. Note that any costs incurred as a result of child find activities are not included in the above analysis.

Based on the information received from the consultation with appropriate representatives of private school students with disabilities previously discussed, the LEA will decide the type and location of services that will be provided to students with disabilities in private schools.

In so doing, the LEA may consider providing direct services, consultative services or both. The location of the student is also a possible factor in determining what, if any, service to offer. It may be reasonable, as a result of the consultation process, for a LEA to elect not to provide services to students who attend a private school outside of the district. (See Question 37, OSEP Memorandum 00-14)

Services Plans

For those students who will receive some special education and/or related services as determined by the LEA, the LEA will develop a services plan instead of an Individualized Education Program (IEP). The services plan must specify what services will be provided (which may be less than the student would receive if enrolled in a public school) and be developed, reviewed and revised by the same participants who develop IEPs. A representative of the private school shall be invited to attend the meeting to develop the child's services plan and if unable to do so, the LEA shall use other methods, such as conference calls, to ensure their participation. 34 C.F.R. §300.455(b). The services, which the private school students receive, must be provided by personnel meeting the same standards as personnel providing services to students in public schools.

Location of Services

The LEA, after considering the information received from consultation with representatives of private school children, determines the location of services.

The services may be provided on site, at the public school or a neutral location. 34 C.F.R. §300.456. This may include services on site at a parochial school, to the extent consistent with law, as will be addressed later in this paper.

Should transportation be required for the private school student with disabilities to benefit from or participate in the services provided under their services plan, such transportation must be provided. Such transportation may include transportation from the private school or home to the service site or from the service site to the private school or home (depending on the timing of the service). LEAs are not required to provide transportation from the home to the child's private school. Any transportation costs incurred may be included in calculating the pro-rated amount required to be spent on services. 34 C.F.R. §300.456.

Reevaluations

The reevaluation requirements applicable to public school students with disabilities also apply to private school students with disabilities. Reevaluations must be conducted at least every three years or more often if conditions warrant or the parent or teacher requests. A reevaluation should be conducted of every child with a disability, even if that child was not a child who received service through a Services Plan. The scope of the reevaluation is a decision for the IEP team and informed written parental consent must be sought if the reevaluation will involve more than a review of existing information. If a child has not received service through a Services Plan, it is likely that a review of existing information would not be sufficient for reevaluation purposes. 34 C.F.R. §§300.505, 300.533, and 300.536.

Due Process Rights

Parents have the right to file for a due process hearing only on the issue of child find activities. Parents do not have the right to contest a due process hearing's decisions regarding the services their child will or will not receive. In such a case, parents may file an administrative complaint with the state education agency. 34 C.F.R. §300.457.

Home-Schooled Students

The analysis and comments to the regulations clarify that the IDEA's provision addressing private school students would also apply to students with disabilities who are being home-schooled if state law so provides. If a state considers home schools to be private schools, the above analysis applies. If not, the school district would still have child find responsibilities under the IDEA and if found eligible, would have a responsibility to offer to provide a FAPE should the parents decide to enroll their child in the public school.

Preschoolers

The statutory and regulatory requirements discussed in this paper are fully applicable to children with disabilities aged 3 through 5 placed by their parents at private schools. State law will control whether day care centers and preschools are considered private schools for purposes of this analysis. The same procedures regarding child find, eligibility determinations and service determinations which apply to school-aged students apply to preschoolers. (See Question 38, OSEP Memorandum 00-14).

Services On-Site of a Parochial School

As the 1997 Amendments state, a school district may provide the services it offers students with disabilities who are placed in private schools with services on site of the private school "to the extent consistent with law".

The United States Supreme Court, expanding its holding from the Zobrest decision, held that supplementary instructional services under Title I of the Elementary and Secondary Act may be provided in a religiously affiliated private school without violating the Establishment Clause of the Constitution. Agostini v. Felton (1997). In guidance issued by the United States Department of Education, the Department stated, " ... the implication of the Court's ruling is that there is not a constitutional bar to public school employees providing educational services in private schools under other Federal programs under similar circumstances." Question 25 from Guidance on the Supreme Court's Decision in Agostini v. Felton (United States Department of Education, July 18, 1997).

The Agostini holding was specifically applied to the provision of special education and related services by the United States Court of Appeals, Sixth Circuit, which held that furnishing occupational therapy and physical therapy on the premises of a parochial school did not violate the Establishment Clause of the Constitution. Peck v. Lansing School District, 28 IDELR 472 (1998).

As was noted earlier in the document, some states have laws which may impose limitations on the discretion provided under federal law or exceed the minimum legal standard set by the IDEA. A recent decision from the United States Court of Appeals, Ninth Circuit is illustrative.

The Court in KDM by WJM v. Reedsport School District, 31 IDELR 107 (1999) held that an Oregon regulation mandating that special education and related services must be provided in a religiously neutral setting did not violate the First Amendment. Neither the IDEA nor the Constitution requires that the services be provided on the site of the parochial school. As the Supreme Court noted in Agostini, a school is permitted but not required to provide the services on-site unless there are further restrictions imposed by state law.

Conclusion

In summary, public school officials need to ensure that the LEA has policies and procedures, which provide for:

- ongoing child find and evaluation services for students who are suspected of having a disability and in need of special education who are being home schooled or placed by their parents in a private school.

- timely and meaningful consultation with appropriate representatives of private school students in order to obtain information for considering:
  - which students will receive services;
  - what services will be provided;
  - how and where the services will be provided; and
  - how the services will be evaluated.

- determining the proportionate share of federal special education funds to be used for services

- developing, implementing and reviewing services plans for students with disabilities in private schools who will be receiving special education or related services from the district

- affording selected due process procedures to parents.

As noted in the introduction, many state laws provide for greater rights and legal entitlements than the IDEA and, therefore, readers should review their state law.

As this paper illustrates, the law addressing the provision of special education and related services to students with disabilities placed in private schools by their parents has been evolving over the years due to statutory and regulatory changes and judicial decisions. Further clarification of the law is anticipated.

Appendix I
OSEP Memorandum 00-14

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

MAY 4 2000

CONTACT PERSONS:
Name: JoLeta Reynolds
Rhonda Weiss
Telephone: (202) 205-5507

OSEP: 00-14

MEMORANDUM

To: Chief State School Officers

From: Kenneth R. Warlick, Director KRW/pg
Office of Special Education Programs

Subject: Questions and Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by Their Parents at Private Schools

In response to requests from the field for a document that restates and consolidates guidance that the Department has provided regarding the nature and extent of school districts' obligations to parentally-placed private school children with disabilities under Part B of the Individuals with Disabilities Education Act (Part B), the attached question and answer document is being issued. Some of the questions contained in this document were raised by individuals who attended the six regional meetings conducted following publication of the final regulations implementing the Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17 (IDEA '97); others were raised subsequent to the issuance of the final regulations. This question and answer document restates the requirements reflected in these final regulations published on March 12, 1999, at 64 Fed. Reg. 12406, and the explanations provided in Attachment 1, Analysis of Comments and Changes, in response to public comments on the proposed regulations applicable to parentally-placed private school children with disabilities.

In determining school district responsibility for children with disabilities in private schools, generally such children are in one of two groups, and public agency responsibility will vary based on the group into which the children fall. The first group includes children with disabilities placed at private schools by public agencies as a means of providing special education and related services. Specifically, if a public agency places or refers a child with a disability to a private school or facility for the purpose of providing a free appropriate public education (FAPE) to that child, the child must receive a program of special education and related services at the private school at no cost to the parents, and the child and his or her parents have all of the rights that they would have if the child were served by the public agency. 34 CFR §300.401. The second group of children includes children with disabilities placed at private schools by their parents, and this second group consists of two subgroups. The children with disabilities in the first subgroup are placed by their parents at private schools when FAPE from a

public agency program or placement is not at issue, and this subgroup of children, which must be provided special education and related services consistent with their numbers and needs, has no individual entitlement to services under Part B. 34 CFR §§300.403(a) and 300.450-300.462.

The second subgroup includes children with disabilities placed at a private school by their parents without the consent of or referral by the public agency because the parents believe that the public agency has failed to offer their child FAPE. If a hearing officer or court agrees with the parent and finds that there has been a denial of FAPE, the parents may be able to obtain tuition reimbursement for part or all of the cost of their unilateral private school placement. 34 CFR §300.403(c). The specific requirements relating to disputes about FAPE are not addressed by this guidance. Rather, the guidance set forth in this question and answer document focuses on the responsibilities of public agencies to provide for the participation of all children with disabilities placed by their parents in private schools in the Part B program in accordance with 34 CFR §§300.450-300.462.

The Department believes that the right of parents to choose where their children should be educated, whether at public or private school, is extremely important. Nevertheless, the rights of parentally-placed private school children with disabilities under Part B are not the same as those of children with disabilities who are enrolled in public schools and are served at public agency programs or public agency placements at private schools.

In the 1997 reauthorization of IDEA, Congress amended Part B to include explicit statutory provisions that reflect the Department's longstanding interpretations of the obligations of State and local educational agencies (SEAs and LEAs) to parentally-placed private school children with disabilities under Part B and the Education Department General Administrative Regulations (EDGAR). The following is a brief summary of the major applicable provisions in IDEA '97 that are relevant to parentally-placed private school children with disabilities:

(1) Provision is made for the participation of children with disabilities enrolled by their parents in private preschool, elementary, and secondary schools, consistent with their number and location in the State, in the program assisted or carried out under Part B by providing for such children special education and related services;

(2) Activities are conducted to locate, identify, and evaluate children placed by their parents in private schools, including religious schools, who may need special education and related services. This requirement is known as child find;

(3) A proportionate amount of the Federal funds available under Part B is expended for services for parentally-placed private school children with disabilities; and

(4) Special education and related services may be provided to parentally-placed private school children with disabilities on the premises of private, including religious schools, in a manner that does not violate the Establishment Clause of the First Amendment to the U.S. Constitution and is consistent with applicable State constitutions and laws.

20 U.S.C. §1412(a)(10)(A); 34 CFR §300.451-300.462.

Department regulations at 34 CFR §§300.450-300.462, which implement the above statutory provision, also contain some of the general provisions governing the participation of children

enrolled in private schools in programs assisted or carried out with Federal education program funds at 34 CFR §§76.651-76.662 of EDGAR that apply to a number of other Department programs.

Let me emphasize that there is nothing in IDEA '97 or the final Part B regulations that alters or diminishes school districts' obligations to ensure the equitable participation of parentally-placed private school children with disabilities in programs assisted or carried out under Part B. Nor is there anything in the Statute or the implementing regulations that is intended to confer an individual entitlement on these children. However, the statute and regulations in no way prohibit States or local school districts from providing services to parentally-placed private school children with disabilities in excess of those required under Part B, consistent with State law or local policy.

The attached questions and answers have been prepared to assist State and local education officials and private school representatives, as well as parents of children with disabilities in understanding the requirements of Part B, as amended by IDEA '97, and the implementing regulations that relate to the participation of parentally-placed private school children with disabilities in programs assisted or carried out under Part B. This question and answer document represents informal policy guidance; however, the statute and regulations upon which it is based are binding on public agencies receiving funds under Part B. Therefore, the statute and regulations which constitute the legal authority for this document--20 U.S.C. §1412(a)(10)(A) and 34 CFR §§300.450-300.462--should be used for legal citation purposes.

We hope that the attached question and answer document is helpful. Please ensure that this document is widely disseminated throughout your State so that this information can be provided to a large variety of interested individuals and organizations. If you or members of your staff have questions, please contact either of the contact persons whose names and telephone numbers are listed at the top of this memorandum.

Attachment

cc: State Directors of Special Education
Federal Resource Center
Regional Resource Centers
Office of Non-Public Education
Secretary's Regional Representatives
National Disability Organizations
Protection and Advocacy Agencies
Parent Training and Information Centers
RSA Regional Commissioners
Independent Living Centers

Questions and Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by Their Parents at Private Schools

I. Child Find

Question 1: What is child find for parentally-placed private school children with disabilities?

Answer: The Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17 (IDEA '97) clarify the Department's longstanding policy and explicitly provide that the child find requirements in section 612(a)(3) of IDEA apply to private school children, including religious school children. 20 U.S.C. §1412(a)(10)(A)(ii). Child find refers to ongoing activities undertaken by SEAs and LEAs to locate, identify, and evaluate all children residing in the State who are suspected of having disabilities under Part B of IDEA (Part B), so that a free appropriate public education (FAPE) can be made available to all eligible children. 34 CFR §§300.121, 300.125 and 300.220. (For parentally-placed private school children with disabilities, the offer of FAPE is accomplished by offering to make available to an eligible child a public agency program or a public agency placement at a private school. Parents can choose not to accept public education in favor of their parental private school placement.) Under Part B, each LEA must conduct child find for all children in public and private schools, including religious schools, residing in the jurisdiction of the LEA, regardless of the severity of their disability, who are in need of special education and related services. 34 CFR §300.451.

In carrying out child find for parentally-placed private school children, SEAs and LEAs undertake activities similar to those undertaken for their publicly enrolled or publicly-placed children, such as widely distributing informational brochures, providing regular public service announcements, staffing exhibits at health fairs and other community activities, and creating direct liaisons with private schools. Once children are identified who are suspected of having disabilities under Part B, LEAs must have procedures for conducting, at no cost to parents, Part B evaluations of such children residing in their jurisdiction within a reasonable period of time and without undue delay.

Since public agencies need to have data to develop an accurate count of the total number of eligible private school children with disabilities residing in their jurisdiction in calculating the proportionate share of their Part B subgrant that must be expended annually for services for these children, child find for parentally-placed private school children with disabilities is particularly important.

Question 2: Can amounts expended for child find, including individual evaluations, be deducted from the required amount of funds to be expended on services for parentally-placed private school children with disabilities?

Answer: No. The statutory provisions regarding child find and participation of parentally-placed private school children with disabilities in programs assisted or carried out under Part B of IDEA are separate and distinct obligations. The child find obligation, including individual evaluations, exists independently from the services provision. (Compare 20 U.S.C. §1412(a)(3)

with 20 U.S.C. §1412(a)(10)(A)). Therefore, the costs of child find activities, including individual evaluations, may not be considered in determining whether an LEA has met the annual expenditure requirement for services for parentally-placed private school children with disabilities under Part B. 34 CFR §300.453(c).

Question 3: Must child find for private, including religious-school children be comparable to child find for public school children?

Answer: Yes. Activities undertaken to carry out child find for parentally-placed private school children, including religious-school children, must be comparable to activities undertaken for child find for children in public schools. 34 CFR §300.451(a). This would include the timing of these activities, and LEAS may not delay conducting child find, including individual evaluations, for parentally-placed private school children with disabilities until after child find for publicly-enrolled or publicly-placed children has been conducted. In determining how and when to carry out child find, public agencies must consult with appropriate representatives of parentally-placed private school children with disabilities. 34 CFR §300.451.

Question 4: How can LEAs meet their child find obligations for parentally-placed private school children residing in their jurisdiction, including religious schools?

Answer: LEAs can choose to meet this obligation by conducting the relevant activities or through contract, interagency agreement with some other entity, or through some other arrangement. If such an arrangement were undertaken, the LEA, and ultimately the SEA, still would retain responsibility for ensuring that all applicable Part B requirements are met. Whether an LEA could contract with a private school to conduct certain aspects of its child find, including individual evaluations, would have to be determined on a case-by-case basis.

Question 5: May LEAs restrict their child find activities to children with certain disabilities, and exclude from child find some children, if the LEA determines, through consultation, that it will offer its population of parentally-placed private school children with disabilities only certain specified services?

Answer: No. In conducting child find of all children residing in their jurisdiction, LEAs must identify and evaluate all children suspected of having any disabilities specified in Part B, regardless of whether such children are parentally-placed at private schools, including religious schools. 34 CFR §§300.125 and 300.220. Therefore, LEAs may not exclude children suspected of having certain disabilities, such as those with mild or moderate disabilities, from their child find activities. This is so, regardless of whether State laws or policies specify which children parentally-placed at private schools suspected of having certain disabilities must be evaluated.

Question 6: Once parentally-placed private school children suspected of having disabilities under Part B are identified, are the requirements applicable to evaluations of such children the same as requirements applicable to other children suspected of having disabilities?

Answer: Yes. Evaluations of all children suspected of having disabilities under Part B, regardless of whether their parents have chosen to enroll them in private schools, must be conducted within a reasonable period of time in accordance with requirements at 34 CFR §§300.532-300.535 of the Part B regulations, and the parents must give their informed consent to conduct the evaluation. 34 CFR §300.505(a)(i). Section 300.532 of the Part B regulations sets out minimum evaluation procedures. Among other requirements, evaluations conducted under Part B can be accomplished through tests and other evaluation materials that must be selected and administered so as not to be discriminatory on a racial or cultural basis, and must be provided in the child's native language or other mode of communication unless it clearly is not feasible to do so. 34 CFR §300.532(a)(1)(i)-(ii).

No single procedure can be used as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child. 34 CFR §300.532(f). Also, the child must be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 CFR §300.532(g). A review of existing data is part of both the initial evaluation, if appropriate, and a reevaluation. This would include evaluations and information provided by the parents of the child. 34 CFR §300.533(a).

Question 7: Following the evaluation, are the requirements the same for parentally-placed private school children as for other children who have been evaluated under Part B?

Answer: As with public school children, following the initial evaluation, an eligibility determination must be made by a group of qualified professionals and the child's parents, and this group must determine whether the child is a child with a disability as defined in Part B of the Act. 34 CFR §300.534(a)(1). The public agency must provide the parent a copy of the evaluation report and the documentation of the eligibility determination. 34 CFR §300.534(a)(2). In making the eligibility and placement determination, that is, in determining whether the child is a child with a disability and what the child's educational needs are, the public agency must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, and ensure that information obtained from all of those sources is documented and carefully considered. 34 CFR §300.535(a).

Question 8: Following the initial determination that a parentally-placed private school child is an eligible child with a disability under Part B, must the public agency develop an IEP for the child?

Answer: If a determination is made that the child needs special education and related services, the general rule in 34 CFR §300.535(b) is that an IEP must be developed for the child in accordance with 34 CFR §§300.340-300.350, with one important exception. If the parents make clear their intention to enroll their child at a private school and that they are not interested in a public program or placement for their child, the public agency need not develop an IEP for the child. If the parents choose not to accept the public agency's offer to make FAPE available to their child, the public agency still must include the child in its eligible population of parentally-

placed private school children with disabilities whose needs must be considered and addressed in accordance with 34 CFR §§300.450-300.462 of the Part B regulations.

Question 9: Are public agencies required to conduct periodic reevaluations of parentally-placed private school children with disabilities, and if so, of which parentally-placed private school children?

Answer: Yes. The requirements for reevaluations that are applicable to children with disabilities served at public agency programs or at public agency placements at private schools apply equally to parentally-placed private school children with disabilities. Part B requires public agencies to conduct reevaluations of a child with a disability, if conditions warrant a reevaluation, or if the child's parent or teacher requests a reevaluation, but at least once every three years. Before additional assessments are conducted, parents must give informed consent. 34 CFR §300.536.

Question 10: Can expenditures for reevaluations be considered in determining whether a public agency has met the expenditure requirements for services for parentally-placed private school children with disabilities?

Answer: No. A reevaluation, as a part of child find, must be conducted at no cost to parents, and expenditures for reevaluations may not be considered in determining whether an LEA has met the requirement at 34 CFR §300.453(a) regarding expenditures for services for parentally-placed private school children with disabilities. 34 CFR §300.453(c). The three-year reevaluation requirement applies to all eligible parentally-placed private school children with disabilities, even to those parentally-placed private school children with disabilities who are not currently receiving special education or related services from a public agency in connection with a parental private school placement. It is essential for public agencies to ensure that required reevaluations of all parentally-placed private school children with disabilities are conducted because they provide current data for use in the annual count of the total number of eligible parentally-placed children with disabilities residing in the LEA's jurisdiction. This annual count of eligible parentally-placed private school children is used in calculating the proportionate share of funds that must be expended on services for this population of children.

Question 11: Which LEA is responsible for child find and in meeting requirements for reevaluation if the private school the child attends is located outside of the LEA of the child's parents' residence?

Answer: SEAs and, consistent with State policy, LEAs, are responsible for ongoing efforts to locate, identify, and evaluate all children residing in the State who are suspected of having disabilities under Part B, so that FAPE is made available to all eligible children. 34 CFR §§300.121, 300.125, and 300.220. Generally, as a matter of State law, children are considered to reside in the home of their parents even if they physically do not live there. This would mean that if a child attends a private school located in an LEA (either in the same State or in another State) other than the LEA in which the child's parents reside, the LEA in which the child's parents reside generally would be responsible for child find, as well as ensuring that required

reevaluations are conducted, unless the State assigns that responsibility to another entity. An LEA has flexibility as to how it ensures these responsibilities are met. For example, it may assume the responsibility itself, contract with another public agency, or make other arrangements. If the LEA through child find identifies a child as a child with a disability, and is not the entity responsible for child find, that LEA should notify the resident LEA of the child's parents so that required evaluations can occur.

Question 12: Do parents who disagree with a public agency's child find determination with respect to their parentally-placed private school child have any recourse?

Answer: Yes. Parents may use the Act's due process procedures at §§300.504-300.515 regarding issues related to the identification and evaluation of children under Part B. 34 CFR §300.457(b). This would include disputes regarding child find, including individual evaluations, of children residing in the LEA's jurisdiction whose parents choose to enroll them in private schools. For example, disagreements between parents and school districts involving the child's eligibility for special education and related services, an LEA's refusal to conduct an evaluation or reevaluation of an individual parentally-placed private school child, or an LEA's refusal to conduct a requested evaluation or reevaluation of an individual parentally-placed private school child within a reasonable period of time, are all issues that could be raised in a due process hearing. In addition, an organization or individual may file a signed written complaint in accordance with the State complaint procedures at 34 CFR §§300.660-300.662 of the Part B regulations, alleging that an SEA or LEA has violated the applicable child find requirement, including individual evaluation and reevaluation requirements.

Question 13: If parents reside in LEA A and enroll their child with a disability at a private school located in LEA B, which LEA is responsible for locating and evaluating that child, including that child in its annual count of eligible parentally-placed private school children with disabilities that is conducted for determining the expenditure requirement, and for determining whether the child should receive services under Part B?

Answer: The LEA of the parent's residence generally would be responsible for child find, unless the State assigns that responsibility to some other entity. 34 CFR §§300.125 and 300.220. If the non-resident LEA identifies a child as a child suspected of having a disability, the non-resident LEA should notify the LEA of the parent's residence so that appropriate evaluations can occur.

The LEA in which the child's parent's reside would also be responsible for including the child in the count of eligible parentally-placed private school children with disabilities, regardless of whether the child has been designated to receive services from that LEA. 34 CFR §300.453. Through consultation conducted in accordance with 34 CFR §300.454, the LEA of the parent's residence must consider the needs of parentally-placed private school children with disabilities residing in the agency's jurisdiction, even though those students have been enrolled by their parents in private schools located outside of the district's boundaries. The LEA of the parent's residence, however, after consultation with representatives of parentally-placed private school children, could elect not to serve those children in light of the available funds that must be expended on services for this population of children.

II. Annual Expenditures for Parentally-placed Private School Children with Disabilities

Question 14: How is the proportionate share for expenditures for services for parentally-placed private school children with disabilities calculated?

Answer: IDEA '97 confirms the Department's longstanding interpretation that each LEA must expend, during the grant period, on the provision of special education and related services for the parentally-placed private school children with disabilities residing in the LEA's jurisdiction an amount that is equal to--

(1) a proportionate share of the LEA's subgrant under section 611(g) of the Act for children with disabilities aged 3 through 21. This is an amount that is the same proportion of the LEA's total subgrant under section 611(g) of the Act as the number of parentally-placed private school children with disabilities aged 3 through 21 residing in the LEA's jurisdiction is to the total number of children with disabilities in the LEA's jurisdiction aged 3 through 21; and

(2) a proportionate share of the LEA's subgrant under section 619(g) of the Act for children with disabilities aged 3 through 5. This is an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as the total number of parentally-placed private school children with disabilities aged 3 through 5 residing in the LEA's jurisdiction is to the total number of children with disabilities in the LEA's jurisdiction aged 3 through 5.
20 U.S.C. §1412(a)(10)(A)(i)(I); 34 CFR §300.453(a).

Consistent with this statutory requirement and the final Part B regulation implementing this requirement, annual expenditures for parentally-placed private school children with disabilities are calculated based on the total number of children with disabilities residing in the LEA's jurisdiction eligible to receive special education and related services under Part B, as compared with the total number of eligible parentally-placed private school children with disabilities residing in the LEA's jurisdiction. 34 CFR §300.453(a). This ratio is used to determine the proportion of the LEA's total Part B subgrants under section 611(g) for children aged 3 through 21, and under section 619(g) for children aged 3 through 5, that is to be expended on services for parentally-placed private school children with disabilities residing in the LEA's jurisdiction.

The following is an example of how the proportionate share is calculated:

Number of eligible children in public schools = 300
Number of eligible children in private school = 20
Total number of eligible children residing in the jurisdiction of the LEA = 320

The number of children served was:

300 public school children + 5 private school children = 305

Federal flow-through funds to School District is $152,500

Using this formula,

> there are 20 eligible parentally-placed private school children within a total number of 320 eligible public and private school children. The number of eligible parentally-placed private school children (20) divided by the total number of eligible public and private school children (320) indicates that 6.25 percent of the LEA's subgrant, or $9,531.25, must be spent for the group of parentally-placed children residing in the LEA and placed by their parents in private schools.

A graphic representation of the above description on how the proportionate share is calculated is provided in Attachment 1.

Question 15: Is the proportionate share based on the number of children with disabilities receiving special education or related services in accordance with a services plan, or on the total number of eligible private school children with disabilities residing in the LEA's jurisdiction?

Answer: The proportionate share is determined based on the total number of eligible parentally-placed private school children with disabilities residing in the LEA's jurisdiction, and is not limited to the number of those children receiving special education or related services in accordance with a services plan.

Question 16: When must LEAs conduct the annual count of *eligible* parentally-placed private school children with disabilities residing in their jurisdiction (the Count required at §300.453)?

Answer: SEAs must decide, on a Statewide basis, (either December 1 or the last Friday in October) the date on which their LEAs will conduct the annual count of the total number of eligible parentally-placed children with disabilities. LEAs and SEAs are already counting children with disabilities who are receiving special education and related services either on December 1 or the last Friday in October of each year, and the SEA must conduct the annual count of eligible parentally-placed private school children with disabilities on the same date. Using the same date on a Statewide basis should reduce the amount of double counting of private school children with disabilities who move from one location to another, and should give States the same flexibility they have with regard to counting other children with disabilities who are receiving services under Part B of the Act.

Question 17: In meeting the requirement to expend a proportionate share of available Federal funds on services for parentally-placed private school children with disabilities residing in their jurisdiction, may LEAs use funds other than Federal funds?

Answer: Yes. Section 612(a)(10)(A)(i) describes the minimum amount that must be spent on services for parentally-placed private school children with disabilities and does not specify that only Federal funds can be used to satisfy this obligation. Thus, if a State or LEA uses other

funds other than Part B funds to provide special education and related services to parentally-placed private school children with disabilities, those funds can be considered in satisfying the expenditure requirements of 20 U.S.C. §1412(a)(10)(A)(i)(I) and 34 CFR §300.453, so long as the services are provided in accordance with the other provisions of §§300.452-300.462. See Analysis of Comments and Changes, Attachment 1 to the final regulations, 64 Fed. Reg. at 12603 (Mar. 12, 1999).

Question 18: May State or local funds be used to provide services to parentally-placed private school children with disabilities in excess of the services provided for this population of children with the proportionate share of available funds?

Answer: Yes. SEAs and LEAs are not prohibited from providing services to parentally-placed private school children with disabilities in excess of those provided with the proportionate share of Part B funds, if doing so is consistent with State law or local policy. 34 CFR §300.453(d) and Analysis of Comments and Changes, published as Attachment 1 to the final regulations, 64 Fed. Reg. at 12603 (Mar. 12, 1999).

Question 19: How are Part B funds distributed now that the permanent funding formula is in effect?

Answer: Until the appropriation under section 611(j) of the Act exceeds $4,924,672,200 under the funding formula applicable to the Grants to States program, authorized by section 611(g) of IDEA, funds were allocated to States under the interim formula. 34 CFR §300.703(b). Under the interim formula, funds were allocated to States, and through them to LEAs, based on an annual count of children with disabilities receiving special education and related services on the count date, and, in the case of parentally-placed private school children with disabilities, those receiving special education or related services on the count date. Now that the appropriation under section 611(j) of the Act exceeds $4,924,672,200, funds will be allocated to States, and through them to LEAs, under the permanent formula. Thus, the permanent formula will be used to distribute Part B Grants to States funds to States on or about July 1, 2000, and allocations will no longer be based on an annual count of children receiving special education and related services on the count date. The permanent formula previously has taken effect for the Preschool Grants Program. Under the permanent formula, it will still be important for SEAs and LEAs to maintain accurate data about the number of parentally-placed private school children with disabilities receiving special education or related services and the total number of eligible parentally-placed private school children with disabilities.

The State allocation under the permanent formula to each LEA that has established its eligibility under section 613 of the Act is the total of three amounts:

- a base payment, that is, the amount the agency would have received for the fiscal year prior to the first fiscal year that the appropriation under section 611(j) of the Act exceeds $4,924,672,200, had the State allocated 75 percent of its grant to LEAs. 34 CFR §300.712(a);

- the population payment which consists of 85 percent of any remaining funds distributed on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within each agency's jurisdiction. 34 CFR §300.712(b)(3)(i); and
- 15 percent of any remaining funds allocated to eligible LEAs in accordance with their relative numbers of children living in poverty, as determined by the SEA. 34 CFR §300.712(b)(3)(ii); 34 CFR §300.712(b)(3).

Therefore, funds generated by LEAs for FFY 1999 for parentally-placed private school children with disabilities who were receiving special education or related services under 34 CFR §§300.452-300.462 that meet State standards on the count date were included in calculating an LEA's base payment under the permanent formula. 34 CFR 300.453 (a)(3)

Question 20: Under the permanent formula, will it still be necessary to conduct an annual count of parentally-placed private school children with disabilities?

Answer: Yes. The count still will be required under 34 CFR §300.453 of the part B regulations for purposes of determining the total number of eligible parentally-placed private school children with disabilities residing in the LEA's jurisdiction. This information is required for purposes of calculating the proportionate share that an LEA is required to expend on an annual basis for the provision of special education and related services for its population of parentally-placed private school children with disabilities. In addition, the count of children served that is conducted under 34 CFR §300.751 will still be required.

Question 21: In the permanent formula, 85 percent of funds above the base payment are distributed on the basis of the "relative numbers of children *enrolled* in public and private elementary and secondary schools within each agency's jurisdiction." What does this mean since some parentally-placed private school children *live* in the jurisdiction of the LEA but are *enrolled* in a private school *outside* of the LEA's jurisdiction?

Answer: In allocating 85 percent of any remaining funds to LEAs based on the relative numbers of children enrolled in public and private elementary and secondary schools within each agency's jurisdiction, States must apply on a uniform basis across all LEAs the best data that are available to them. 34 CFR §300.712(b)(3)(iii). It is within the State's discretion to determine whether the LEA where the private school is located or the LEA of the parent's residence should include the child in its private school enrollment count.

A State could determine, for example, that a child whose parents reside in LEA A and attends a private school located in the boundaries of LEA B is enrolled in LEA B in calculating the percentage of funds allocated to an LEA based on the relative numbers of children enrolled in public school and private elementary and secondary schools in the LEA's jurisdiction. While States have flexibility in this area, a uniform rule must be applied on a Statewide basis. These children would then need to be in the group of parentally-placed children with disabilities whose needs must be considered by the LEA in determining which parentally-placed private school children with disabilities will be served and the types and amounts of services to be provided to eligible children.

III. Provision of Services

Question 22: Are there any particular kinds of services, and specified amounts of services, to be provided to parentally-placed private school children with disabilities under Part B?

Answer: No. No parentally-placed private school child with a disability has an individual right to special education and related services under Part B. 34 CFR §300.454(a). Therefore, the responsible public agency is not required to provide a parentally-placed private school disabled child with some or all of the special education and related services that the child would receive if enrolled in a public school. This reflects the Department's longstanding interpretation of the limitations of SEAs' and LEAs' statutory obligations to make services available to the population of eligible parentally-placed private school children with disabilities, in light of the limited amount of funds that LEAs must expend on services for these children.

Question 23: How are decisions made about the services that are to be provided to parentally-placed private school children with disabilities, including the type and location of such services, in light of the limited amount of funds that must be expended annually on services for this population of children?

Answer: Each LEA must consult, in a timely and meaningful way, with appropriate representatives of parentally-placed private school children with disabilities, in light of the minimum amount of Part B funds that must be expended for services for this population of children, on the number of parentally-placed private school children with disabilities, the needs of those children, and their location. Through this consultation process, decisions are made about which parentally-placed private school children with disabilities will receive services, what services will be provided, how and where the services will be provided, including the timing and location of the services provided, and how the services provided will be evaluated. Each LEA must give appropriate representatives of parentally-placed private school children with disabilities a genuine opportunity to express their views regarding each matter that is the subject of the consultation process. However, the LEA makes the final decision about which eligible children will receive services, the services to be provided to eligible parentally-placed private school children with disabilities, and where the services will be provided. 34 CFR §300.454(b)(1), (2), and (4).

Question 24: When must consultation about services occur?

Answer: Consultation about the provision of services must occur, in a timely and meaningful way, before the LEA makes any decision that affects the opportunities of parentally-placed private school children with disabilities to participate in services provided under Part B requirements to those children. 34 CFR §300.454(b)(3). The needs of parentally-placed private school children with disabilities, their number and location, may vary over time, depending on the circumstances in a particular LEA in a particular year. As there is no specific schedule for consultation with appropriate representatives of parentally-placed private school children with

disabilities, States and LEAs are able to determine the appropriate period between consultations based on circumstances in their jurisdictions. Many jurisdictions have found that it works well when consultation takes place, at a minimum, to review the child find process, discuss the child count, and plan the services being offered prior to each school year. The regulations do not include specific requirements regarding matters such as public notice of meetings, public transcripts of meetings, explanations of amounts and frequency of services provided, or explanations of refusals to provide services, changes in the manner in which services are provided, or the manner in which funds are allocated, leaving these issues to State and local authorities.

Question 25: Which individuals are appropriate representatives of parentally-placed private school children with disabilities? What about parents of such children?

Answer: Part B does not specify which individuals are "appropriate representatives" of parentally-placed private school children with disabilities. However, since one aspect of consultation is intended to discuss the needs of children with disabilities placed in private schools by their parents, it would be reasonable for parents to be considered "appropriate representatives" of such children. Other "appropriate representatives" of parentally-placed private school children might be teachers, principals, and, in the case of private school systems, central office administrators responsible for federal program services and/or special education. Whether parents of home-schooled children or other representatives of home-schooled children should be considered "appropriate representatives" of parentally-placed private school children with disabilities depends on whether under State law, home schooling is regarded as parental placement at private school.

Question 26: Is it possible for an LEA, through consultation with appropriate representatives of parentally-placed private school children with disabilities, to provide only certain direct services to those parentally-placed private school children with disabilities designated to receive services?

Answer: Yes. Based on relevant input from consultation, and in light of available funding, it could be reasonable for an LEA to conclude that providing direct services would ensure that those parentally-placed private school children with disabilities selected to receive services will derive a benefit from the services offered. For example, an LEA could determine through consultation that providing direct services for fewer children would be more beneficial in addressing the needs of its parentally-placed private school children with disabilities than providing consultative services, instructional materials, equipment, or teacher training.

Question 27: Is it possible for an LEA, through consultation with appropriate representatives of parentally-placed private school children with disabilities, to determine that it will provide no direct services to its eligible parentally-placed private school children with disabilities, but that instead, the LEA will provide consultative services, or equipment and teacher training?

Answer: Yes. Through the consultation described above, determinations must be made about how the available amount of funds can be utilized so that the parentally-placed private school children with disabilities designated to receive services can benefit from the services offered.

The regulations specify that the LEA makes the final decision with respect to services to be provided to eligible parentally-placed private school children with disabilities, (34 CFR §300.454(b)(4)), based in part on input provided through the consultation process by appropriate representatives of parentally-placed private school children with disabilities, (34 CFR §300.454(b)(3)). Depending on local circumstances and the amount of funds available for expenditures for this population of children, it could be reasonable for an LEA to conclude that, in lieu of direct services, its parentally-placed private school children with disabilities should be provided with consultative services, equipment and materials, and that training will be provided for private school teachers and other private school personnel.

If consultative services are provided to a private school teacher, as a means of providing special education and related services to a particular private school child with a disability, there may be situations where that teacher uses the acquired skills to provide education to other children as well. However, whatever benefit those other children receive is incidental to the publicly-funded services. As is true if direct services are provided, LEAs that elect to provide consultative services to their parentally-placed private school children with disabilities also must develop a services plan for each child receiving those services in accordance with 34 CFR §300.455(b).

Question 28: How would a services plan be developed for a parentally-placed private school child with a disability receiving consultative services?

Answer: Any parentally-placed private school child with a disability whom an LEA elects to serve must have a services plan. 34 CFR §300.454(c). Each child's services plan must contain, among other elements, a statement of the special education, related services, and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to advance appropriately toward attaining his or her annual goals, to be involved and progress in the general curriculum, and to participate in extracurricular and other nonacademic activities. Consultation between a regular education teacher and a special education teacher could allow the regular educator to provide special education, which consists of specially designed instruction that meets State education standards and is individually-designed for an individual student, or a related service, if that service is required to assist a child with a disability to benefit from special education. Consultative services also could be considered a supplementary aid or service if provided to facilitate a student's education in regular classes alongside his or her nondisabled peers (see 34 CFR §300.28) or a support for school personnel, if provided to enable the child to advance appropriately toward attaining the annual goals and to be involved and progress in the general curriculum.

Question 29: Could an LEA, through consultation with appropriate representatives of parentally-placed private school children with disabilities, decide to provide services that address some of the needs of parentally-placed private school children with disabilities?

Answer: Yes. As noted previously, an LEA must conduct child find for all children enrolled in private schools by their parents who are suspected of having disabilities, regardless of the category of their suspected disability. However, once determined eligible, an LEA must, through the consultation process previously described, determine, among other matters, which parentally-

placed private school children with disabilities will receive services, what services will be provided, and the manner in which those parentally-placed private school children with disabilities selected to receive services will be served. An LEA could properly conclude that it will provide only certain services which may mean that needs commonly associated with one or more disability categories are not met, and that only some of the needs of a child who is served are met. An LEA could decide, through consultation, not to serve any parentally-placed private school children with disabilities who are enrolled at one or more private schools, but instead to limit the services the LEA is offering with the available amount of funds to parentally-placed private school children with disabilities enrolled at only one private school.

Question 30: Is there any requirement for parentally-placed private school children with disabilities to have IEPs?

Answer: No. Current regulations provide that each parentally-placed private school child with a disability who has been designated to receive services from the LEA must have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the consultation process, that it will make available to its parentally-placed private school children with disabilities. 34 CFR §300.455(b)(1).

Question 31: Must services plans be in place for all eligible parentally-placed private school children with disabilities residing in the LEA's jurisdiction?

Answer: No. The Part B regulations do not require public agencies to develop services plans for each and every parentally-placed private school child with a disability residing in the LEA's jurisdiction, regardless of whether that child receives services from the LEA. Services plans are required only for those parentally-placed private school children with disabilities whom the LEA has elected to serve, and must reflect only the services that the LEA has determined it will provide to the particular parentally-placed child with a disability.

Question 32: How must a services plan be developed?

Answer: A services plan must be developed, reviewed, and revised consistent with 34 CFR §§300.342-300.346 of the Part B regulations. The LEA is responsible for initiating and conducting meetings to develop a services plan in accordance with these requirements. The LEA must ensure that a representative of the religious or other private school attends each services plan meeting, and if the representative cannot attend, the LEA must use other methods to ensure participation by the private school, including individual or conference telephone calls.

Question 33: What must a services plan contain?

Answer: As noted above, a services plan, which must reflect only the services offered to a parentally-placed private school child with a disability designated to receive services, must, to the extent appropriate, meet the IEP content requirements in 34 CFR §300.347. Since students with disabilities who are entitled to FAPE must receive the full range of services under Part B,

their IEPs generally will be more comprehensive than the more limited services plans developed and implemented for those parentally-placed private school children with disabilities designated to receive services from an LEA. The requirement that a services plan meet the requirements of an IEP, to the extent appropriate, will ensure that the services actually provided to a parentally-placed private school child with a disability will meaningfully address the child's individual needs.

Example: An LEA has elected to serve an individual parentally-placed private school child with a disability who has speech needs through the provision of speech-language pathology services.

The child's services plan would specify the present levels of educational performance in this area, and how the child's speech-language disability affects the child's ability to be involved and progress in the general curriculum. Measurable annual goals for this child would be specific to the speech-language pathology services to be provided, and would enhance the child's ability to be involved in and progress in the general curriculum. The services plan would also specify the amount, frequency, location, and duration of the services to be provided in accordance with 34 CFR §300.347(a)(6) and how the child's parents will be informed of the child's progress, in accordance with 34 CFR §300.347(a)(7). Whether other content requirements at 34 CFR §300.347 would have to be addressed in a services plan would have to be determined on a case-by-case basis, depending on the services that are provided.

Question 34: Are there any remedies available to parents who dispute the services offered or provided to their child in connection with the parental private school placement?

Answer: Since eligible parentally-placed private school children with disabilities do not have an individual entitlement to services under Part B, the due process procedures in Part B of the Act do not apply to complaints that an LEA has failed to meet applicable requirements for serving these children, including an LEA's alleged failure to provide the services specified on a child's services plan. However, an organization or individual may file a signed written complaint under the applicable State complaint procedures at 34 CFR §§300.660-300.662 alleging that an SEA or LEA has failed to meet the requirements in 34 CFR §§300.451-300.462, such as failure to properly conduct the consultation process. On the other hand, as is true with respect to due process complaints, a State complaint alleging that an LEA has failed to offer services to a particular parentally-placed private school child with a disability would not violate Part B, since no parentally-placed private school child with a disability has an individual entitlement to services under Part B. 34 CFR §300.454(a).

IV. Location of Services

Question 35: How are decisions made about the location of services that the LEA has selected through consultation to offer to its parentally-placed private school children with disabilities?

Answer: As is true regarding the services that an LEA has selected to provide its parentally-placed private school children with disabilities designated to receive services, the location of services also is a matter that is determined through the process of consultation between LEA

officials and appropriate representatives of parentally-placed private school children with disabilities. Services offered to parentally-placed private school children with disabilities may be provided on-site at a child's private school, including a religious school, to the extent consistent with law, or at another location. The phrase "consistent with law" is statutory, and means that the provision of services on the premises of a private school takes place in a manner that would not violate the Establishment Clause of the First Amendment to the U.S. Constitution and would not be inconsistent with applicable State constitutions or laws. The provision of services at private school sites will help to minimize the amounts and time spent on transportation. In addition, this should cause the least disruption in the children's education. Since some States do not allow services to be provided at the private school site, LEAs may wish to seek legal advice before making service location determinations.

Question 36: If transportation would be a related service for a child with a disability, had the child been served directly in a public agency program or a public agency placement at a private school, would transportation automatically become a related service for a parentally-placed private school child with a disability who is designated to receive services from the LEA?

Answer: Regardless of whether transportation would be a related service for a child with a disability, transportation may be necessary for an individual child. If services are offered at a site separate from the child's private school, transportation may be necessary to get the child to and from that other site. Failure to provide transportation could effectively deny the child an opportunity to benefit from the services that the LEA has determined through consultation to offer its parentally-placed private school children with disabilities. In this situation, transportation is not a related service, as defined at 34 CFR §300.24(b)(15), but it still is a necessary means of making the services that are offered accessible to the child.

Question 37: Could an LEA refuse to provide transportation to parentally-placed private school children with disabilities who reside in its jurisdiction but who attend private schools located outside of the LEA's boundaries?

Answer: LEAs are encouraged to work in consultation with appropriate representatives of parentally-placed private school children with disabilities to ensure that services are provided at sites that will not require significant transportation costs. Therefore, it may be reasonable for an LEA, through the consultation process, to elect not to provide services to a child who attends a private school outside the district. However, if any child is selected for services and the service is provided away from the school the child attends, the child must be provided transportation to the service if it is necessary for the child to benefit from or participate in the service. Therefore, it may not be unreasonable for an LEA to elect not to provide services to parentally-placed private school children with disabilities who reside in the LEA's jurisdiction but who attend private schools located outside of the LEA's boundaries because of the increased costs involved.

V. Miscellaneous

Question 38: Are the requirements for children with disabilities aged 3 through 5 who are placed by their parents at private preschool programs, including home day care programs, the same as the requirements for children with disabilities parentally-placed at private elementary and secondary schools?

Answer: Yes. The Department interprets the requirements at 20 U.S.C. §1412(a)(10)(A) and 34 CFR §§300.450-300.462 to be fully applicable to children with disabilities aged 3 through 5 who have been placed by their parents at private schools. Many preschool-aged children also attend a broad range of child care settings. Whether a private day care program conducted in the home or otherwise outside of the administrative control of a public agency can be considered a private preschool depends on the State definition of "private school." That a day care program is licensed under State health and safety and other day care requirements does not make the day care program a "private school" unless the State definition so specifies.

Assuming a child of preschool age is enrolled by his or her parents at a private preschool that satisfies the State definition, the same procedures that govern children with disabilities parentally-placed in private elementary and secondary schools in the State would be applicable. The child would have to be evaluated in accordance with the Part B requirements at 34 CFR §§300.532-300.533, subject to informed parental consent, and determined eligible in accordance with 34 CFR §300.535. Once determined eligible, the affected LEA would offer to make FAPE available at a public agency program or a public agency placement at a private school. In some situations, if the parents were interested in having their child participate in the publicly available services, the public agency could determine that the services specified in the IEP developed for the child could be appropriately implemented in the day care setting selected by the parent at no cost to the parents.

If the parents choose not to accept the public program or placement offered, and if the parents enroll the child in a private preschool recognized under the State's definition, the public agency must include the child in the group of parentally-placed private school children with disabilities whose needs must be considered through the consultation process at 34 CFR §300.454(a)-(b) described earlier.

A parentally-placed private preschool-aged child with a disability who attends a program recognized under the State definition of private school and is designated to receive services from a public agency must have a services plan in accordance with 34 CFR §300.454(c) and §300.455 with respect to the services offered. As is true for services offered to parentally-placed private school children with disabilities in other age groups, services offered to preschool-aged children with disabilities may be provided on the premises of the private program, including a religious school, to the extent consistent with law. 34 CFR §300.456(a). Children in that age group who attend programs recognized under the State definition of private school designated to receive services can be served through the proportionate share of available section 611 and 619 funds that must be expended on services for this population of children. The LEA's annual count of parentally-placed private school children with disabilities residing in the LEA's jurisdiction conducted under 34 CFR §300.453(b) must include all children with disabilities who attend private schools recognized under the State definition. However, children with disabilities parentally-placed at private programs that do not meet the State definition of private school

cannot receive services under Part B and cannot be included in the annual count of parentally-placed private school children with disabilities aged 3 through 5.

Question 39: Are children with disabilities placed by their parents at private schools entitled to a free appropriate public education at the private school?

Answer: No. Children with disabilities placed by their parents at private schools are not entitled to a free appropriate public education (FAPE) in connection with their parental private school placements. States receiving funds under Part B of IDEA, as a condition of receipt of those funds, must make FAPE available to all children with disabilities residing in the State in mandatory age ranges. 20 U.S.C. §1412(a)(1)(A); 34 CFR §300.121. States satisfy their FAPE obligation to their resident parentally-placed private school children with disabilities by offering them FAPE either at a public agency or at a public agency placement at a private school. However, LEAs generally must consider and address the needs of eligible parentally-placed private school children with disabilities residing in their jurisdiction.

Question 40: If parents choose to enroll their child with a disability at a private school because of their preference for the private school, are there any circumstances in which a public agency would be required to make FAPE available to such a child in the future?

Answer: The public agency must include these children in its eligible population of parentally-placed private school children with disabilities whose needs must be considered in accordance with 34 CFR §§300.450-300.462 of the Part B regulations.

In addition, as is true for other children with disabilities, the public agency must evaluate every parentally-placed private school child with a disability at least every three years in accordance with the requirements of 34 CFR §§300.532-300.533 to determine a child's continued eligibility for special education and related services. If the parents withdraw their child with a disability from the private school placement that they have selected and return their child to the public school, the public agency again must make FAPE available to the child either in the public agency or a public agency placement at another public school or at a private school.

Question 41: Are there any particular qualifications that are applicable to personnel who provide special education or related services to those parentally-placed private school children with disabilities LEAs elect to serve?

Answer: Yes. Services provided to parentally-placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing such services in public schools. Funds awarded under Part B, sections 611 and 619, may be used to make public school personnel available in other than public facilities to the extent necessary to provide services to parentally-placed private school children with disabilities under Part B, if those services are not normally provided by the private school. In addition, if private school personnel provide the services that the LEA has determined it will provide to its parentally-placed private school children with disabilities, the private school personnel must meet the same standards as

personnel providing services in public schools, must perform the services outside of his or her regular hours of duty, and must perform the service under public supervision and control. 34 CFR §§300.455(a) and 300.460-300.461.

Question 42: How could a State educational agency monitor to ensure that parentally-placed private school children with disabilities are being served in a manner that complies with Part B?

Answer: Each SEA must exercise general supervision over all education programs for children with disabilities administered by public agencies in the State and must ensure that such programs meet State education standards and Part B requirements. Accordingly, an SEA is required to have a method of monitoring its public agencies to ensure that they are meeting the statutory and regulatory requirements applicable to services for parentally-placed private school children with disabilities. An SEA also would be required to ensure that those parentally-placed private school children with disabilities whom the LEA has elected to serve are receiving special education or related services in accordance with a services plan.

Question 43: How can representatives of parentally-placed private school children with disabilities, including parents of these children, have input into OSEP's reviews of States as part of its continuing improvement monitoring process?

Answer: In monitoring each State, OSEP conducts extensive validation planning activities to help focus its data collection on those issues that are most critical to improving compliance and results for students with disabilities in the State. The validation planning process includes a number of public input forums in which individuals and groups, including parents of parentally-placed private school children with disabilities and other representatives of these children, can provide input regarding the issues that they believe should be a focus of OSEP's data collection in the State. Further, as part of the monitoring process, each State establishes a steering committee that helps the SEA conduct a self-assessment of the State's services for children with disabilities and provides input to OSEP. This committee may, at the State's discretion, include representatives of parentally-placed private school children with disabilities. Further, each State advisory panel on the education of children with disabilities must include representatives of parentally-placed private school children with disabilities. Among the functions of this panel are to advise the SEA in developing corrective action plans to address findings identified in Federal monitoring reports under Part B of the Act. Organizations or individuals that have specific questions or concerns about services for parentally-placed private school children with disabilities in their State should contact their local school district, State Department of Education special education division, or the OSEP State contact for Part B in the Monitoring and State Improvement Planning Division. A list of the OSEP State contacts can be found on the OSEP web page at http://www.ed.gov/offices/OSERS/OSEP/state_contact_list.html

Question 44: Is home school considered a private school? What if a child is below a State's compulsory school age and receiving services from an unapproved or uncertified home day care or other location strictly for child care purposes?

Answer: Whether home schools are "private schools," including home day care, is determined by the State. If the State recognizes home schools or home day care as private schools, children with disabilities in those home schools or home day care must be treated in the same way as other parentally-placed private school children with disabilities. If the State does not recognize home schools or home day care as private schools, children with disabilities who are home-schooled or in home day care are still covered by the child find obligations of SEAs and LEAs, and these agencies must ensure that home-schooled children and those in home day care who have disabilities are located, identified, and evaluated, and that FAPE is available if their parents choose to enroll them in public schools.

Question 45: If under State law, dual enrollment of a child in both a public agency program and a private school is required in order for the child to receive special education and related services from a public agency in connection with a parental private school placement, does the parentally-placed private school child with a disability have a right to FAPE?

Answer: The Part B regulations make clear that no parentally-placed private school child with a disability has an individual entitlement to services. 34 CFR §300.454(a). Whether dual enrollment alters the rights of a parentally-placed private school child with a disability under State law is a State matter. There is nothing in Part B that would prohibit a State from requiring dual enrollment as a condition of eligibility of a parentally-placed private school child with a disability for services from a public agency.

Attachment 1
Proportionate Share Calculation for Parentally-Placed Private School Children with Disabilities

FOR FLINTSTONE SCHOOL DISTRICT:

# of eligible children in public schools	=	300
# of eligible children in private schools	=	20
Total # of eligible children	=	***320***

AT DECEMBER 1 CHILD COUNT:

# of children served in public schools	=	300
# of children served in private schools	=	5
Total # of public & private children served	=	***305***

Note: 305 is the number turned in to OSEP for children served with IEP or service plan.

FEDERAL FLOW-THROUGH FUNDS TO FLINTSTONE SCHOOL DISTRICT:

Total allocation to Flintstone = ***$152,500***

FORMULA FOR CALCULATING PROPORTIONATE SHARE:

$$\text{Total Proportionate Share For Private School Children} = \frac{X}{\text{Total Flow-Through Allocation}} : \frac{\text{Eligible Private School Children}}{\text{Total Eligible Public \& Private School Children}}$$

Note: Proportionate share for parentally-placed private school children is based on total children eligible, not children served.

FLINTSTONE SCHOOL DISTRICT OBLIGATION:

$$\frac{X}{\$152{,}500} : \frac{20}{320}$$

X = ***$9,531.25***
(This amount must be spent for the group of parentally-placed children in private schools)

IDEA Local Implementation by Local Administrators Partnership

ILIAD

1110 North Glebe Road

Suite 300

Arlington, VA 22201-5704

877.CEC.IDEA (toll free)

866.915.5000 (TTY toll free)

703-264-1637 (fax)

www.ideapractices.org

Families and Advocates Partnership for Education

FAPE

8161 Normandale Boulevard

Minneapolis, MN 55437-1044

888.248.0822 (toll free)

952.838.0190 (TTY)

952.838.0199 (fax)

www.fape.org

The Policymaker Partnership

PMP

1800 Diagonal Road, Suite 320

Alexandria, VA 22314-2840

877.IDEA.INFO (toll free)

703.519.7088 (TTY)

703.519.3808 (fax)

www.ideapolicy.org

Associations of Service Providers Implementing IDEA Reforms in Education Partnership

ASPIIRE

1110 North Glebe Road

Suite 300

Arlington, VA 22201-5704

877.CEC.IDEA (toll free)

866.915.5000 (TTY toll free)

703.264.1637 (fax)

www.ideapractices.org

ISBN # 0-86586-956-1

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